James Madison to James Monroe, May 6, 1822. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

TO JAMES MONROE. MAD. MSS.

Montpellier, May 6, 1822.

Dear Sir, This will probably arrive at the moment for congratulating you on the close of the scene in which your labours are blended with those of Congress. When will your recess from those which succeed commence; and when & how much of it will be passed in Albemarle? We hope for the pleasure of halts with us, & that Mrs. M & others of your family will be with us.

Mr. Anduaga I observe casts in our teeth the postponement of the recognition of Spanish America til the cession of Florida was secured, and taking that step immediately after.1 This insinuation will be so readily embraced by suspicious minds, and particularly by the wiley Cabinets of Europe, that I cannot but think it might be well to take away that pretext against us, by an Exposé, brought before the public in some due form, in which our conduct would be seen in its true light. An historical view of the early sentiments expressed here in favor of

1 The Florida treaty was proclaimed February 22, 1821; Monroe's message recommending recognition of South American independence was dated March 8, 1822.

our neighbours, the successive steps openly taken, manifesting our sympathy with their cause, & our anticipation of its success, more especially our declarations of neutrality

towards the contending parties as engaged in a civil, not an insurrectionary, war, would shew to the world that we never concealed the principles that governed us, nor the policy which terminated in the decisive step last taken. And the time at which this was taken, is surely well explained, without reference to the Florida Treaty, by the greater maturity of the Independence of some of the new States, & particularly by the recent revolution in Mexico which is able not only to maintain its own Independence, but to turn the scale if it were doubtful, in favor of the others. Altho' there may be no danger of hostile consequences from the Recognising act, it is desirable

that our Republic should stand fair in the eyes of the world, not only for its own sake, but for that of Republicanism itself. Nor would perhaps a conciliatory appeal to the candour & liberality of the better part of Europe be a superfluous pre caution, with a view to the possible collisions with Spain on the Ocean, & the backing she may receive from some of the great powers friendly to her or unfriendly to us. Russia has, if I mistake not, heretofore gone far in committing herself against a separation of the Colonies from Spain. And her enterprising policy agt. revolutionary events every where make it the more probable that she may resent the contrast to it in that of the U. S. I am aware that these ideas cannot be new to you, & that you can appreciate them much better than I can. But having the pen in my hand I have permitted them to flow from it. It appears that the Senate have been discussing the precedents relating to the appointment of public Ministers. One question is, whether a Public Minister be an officer in the strict constitutional sense.1 If he is, the appointment

1 Madison made the following memorandum on the subject (undated):

Power of the President to appoint Public Ministers & Consuls in the recess of the Senate.

The place of a foreign Minister or Consul is not an *office* in the constitutional sense of the term.

1. It is not created by the Constitution.

2. It is not created by a law authorized by the Constitution.

3. It cannot, as an office, be created by the mere appointment for it, made by the President & Senate, who are to fill, not create offices. These must be “established by law,” & therefore by Congress only.

4. On the supposition even that the appointment could create an office, the office would expire with the expiration of the appointment, and every new appointment would create a new office, not fill an old one. A law reviving an expired law is a new law.

The place of a foreign Minister or Consul is to be viewed, as created by the Law of Nations: to which the U. S. as an Independent nation, is a party; and as always open for the proper functionaries, when sent by the constituted authority of one nation, and received by that of another. The Constitution in providing for the appointment of such functionaries, presupposes this mode of intercourse as a branch of the Law of Nations.

The question to be decided is, What are the cases in which the President can make appointments without the concurrence of the Senate; and it turns on the construction of the power “to fill up all vacancies which may happen during the recess of the Senate.”

The term all embraces both foreign and municipal cases; and in examining the power in the foreign, however failing in exact analogy to the municipal, it is not improper to notice the extent of the power in the municipal.

If the text of the Constitution be taken literally no municipal officer could be appointed by the President alone, to a vacancy not *originating* in the recess of the Senate. It appears however, that under the sanction of the maxim, qui hæret in litera hæret in cortice, and of the argumentum ab inconvenienti, the power has been understood to extend, in cases of necessity or urgency, to vacancies happening to exist, in the recess of the Senate, though not coming into existence in the recess. In the case, for example, of an appointment to a vacancy by the President & Senate, of a person dead at the time, but not known

to be so, till after the adjournment and dispersion of the Senate, it has been deemed within the reason of the constitutional provision, that the vacancy should be filled by the President alone; the object of the provision being to prevent a failure in the execution of the laws, which without such a scope to the power, must very inconveniently happen, more especially in so extensive a country. Other cases of like urgency may occur; such as an appointment by the President & Senate rendered abortive by a refusal to accept it.

If it be admissible at all to make the power of the President without the Senate, applicable to vacancies happening unavoidably to exist, tho' not to originate, in the recess of the Senate, and which the public good requires to be filled in the recess, the reasons are far more cogent for considering the sole power of the President as applicable to the appointment of foreign functionaries; inasmuch as the occasions demanding such appointments may not only be far more important, but on the further consideration, that unlike appointments under the municipal law, the calls for them may depend on circumstances altogether under foreign controul, and sometimes on the most improbable & sudden emergencies; and requiring therefore that a competent authority to meet them should be always in existence. It would be a hard imputation on the Framers and Ratifiers of the Constitution, that while providing for casualties of inferior magnitude, they should have intended to exclude from the provision, the means usually employed in obviating a threatened war; in putting an end to its calamities; in conciliating the friendship or neutrality of powerful nations, or even in seizing a favourable moment for commercial or other arrangements material to the public interest. And it would surely be a hard rule of construction, that would give to the text of the Constitution an operation so injurious, in preference to a construction that would avoid it, and not be more liberal than would be applied to a remedial statute. Nor ought the remark to be omitted that by rejecting such a construction this important function unlike some others, would be excluded altogether from our political system, there being no pretension to it in any other department of the General Government, or in any department of the State Govts To regard the power of appointing the highest Functionaries employed in foreign missions, tho' a

specific & substantive provision in the Constitution, as incidental merely, in any case, to a subordinate power, that of a provisional negotiation by the President alone, would be a more strained construction of the text than that here given to it.

The view which has been taken of the subject overrules the distinction between missions to foreign Courts, to which there had before been appointments, and to which there had not been. Not to speak of diplomatic appointments destined not for stations at foreign courts, but for special negotiations, no matter where, and to which the distinction would be inapplicable, it cannot bear a rational or practical test in the cases to which it has been applied. An appointment to a foreign court, at one time, unlike an appointment to a municipal office always requiring it, is no evidence of a need for the appointment. at another time; whilst an appointment where there had been none before, may, in the recess of the Senate, be of the greatest urgency. The distinction becomes almost ludicrous when it is asked for what length of time the circumstance of a former appointment is to have the effect assigned to it on the power of the President. Can it be seriously alleged, that after the interval of a century, & the political changes incident to such a lapse of time, the original appointment is to authorize a new one, without the concurrence of the Senate; whilst a like appointment to a new court, or even a new nation however immediately called for, is barred by the circumstance that no previous appointment to it had taken place. The case of diplomatic missions belongs to the Law of Nations, and the principles & usages on which that is founded are entitled to a certain influence in expounding the provisions of the Constitution which have relation to such missions. The distinction between courts to which there had, and to which there had not been previous missions, is believed to be recorded in none of the oracular works on international law, and to be unknown to the practice of Governments, where no question was involved as to the *de facto* establishment of a Government.

With this exposition, the practice of the Government of the U. States has corresponded, and with every sanction of reason & public expediency. If in any particular instance the power has been misused, which it is not meant to suggest, that could not invalidate either

its legitimacy or its general utility, any more than any other power would be invalidated by a like fault in the use of it.— *Mad. MSS.*

of him must be authorized by *law* , not by the President & Senate. If on the other hand, the appointment creates the office, the office must expire with the appointment, as an office created by Law expires with the law; & there can be no difference between Courts to which a Public Minister had been sent, & those to which one was sent for the first time. According to my recollection this subject was on some occasion carefully searched into, & it was found that the practice of the Govt. had from the beginning been regulated by the idea that the places or offices of Pub. Ministers & Consuls existed under the law & usages of Nations, and were always open to receive appointments as they might be made by competent authorities.

Other questions may be started as to Commissions for making Treaties; which when given to a public Minister employ him in a *distinct* capacity; but this is not the place, nor am I the person, to pursue the subject.

We had a hard winter & our wheat fields exhibit the proof of it. To make the matter worse, the fly has commenced its ravages in a very threatening manner, a dry cold spell will render them very fatal. I know not the extent of the evil. There has been of late a reanimation of prices for the last crop, occasioned by the expected opening of the W. India Trade; but there is so little remaining in the hands of the Farmers, that the benefit will be scarcely felt by them.